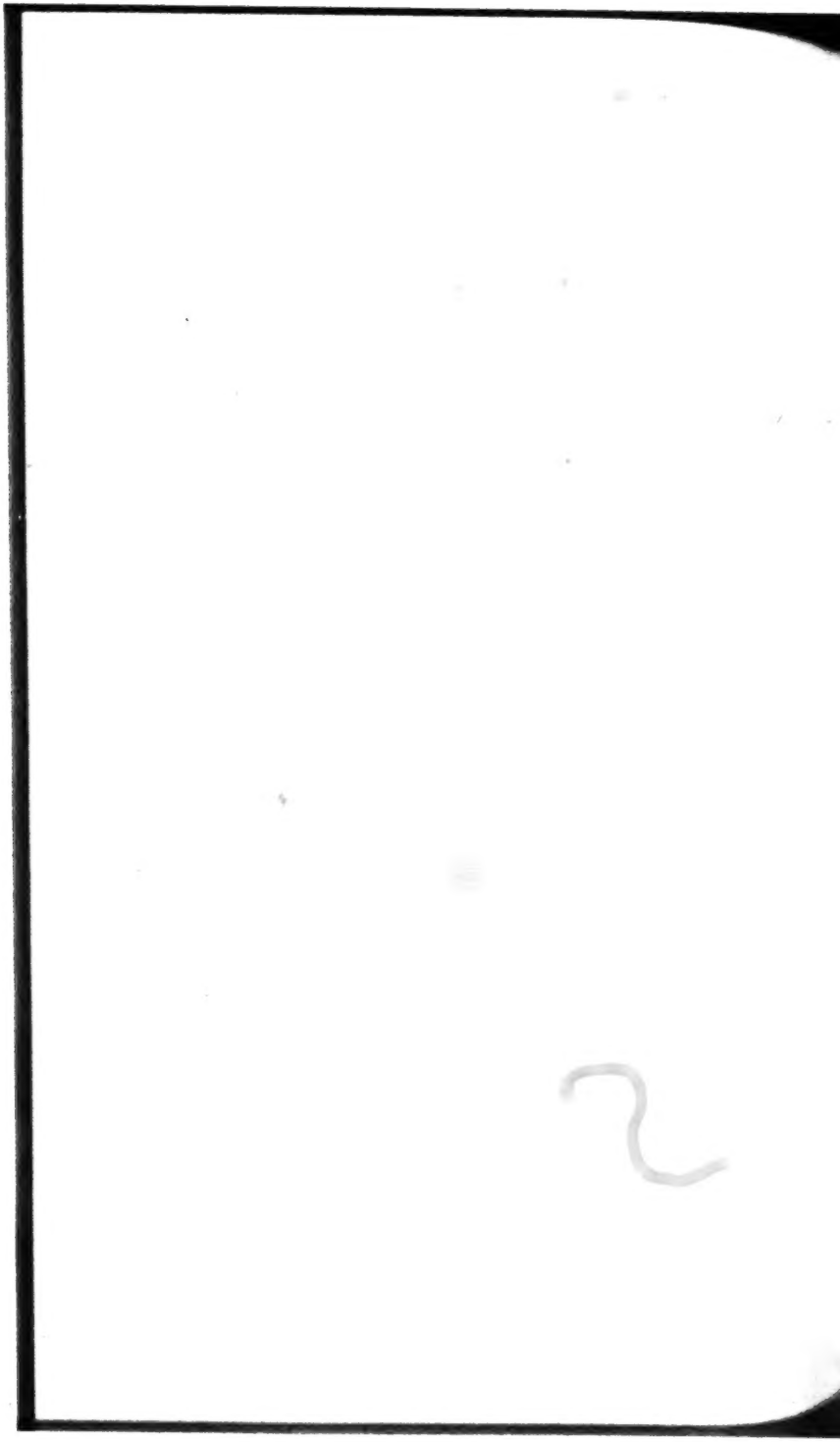

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-62

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

HUBERT WHEELER, *et al.*,
Petitioners,

—v.—

ANNA BARRERA, *et al.*,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, NATIONAL EDUCATION ASSOCIATION, AMERICAN ETHICAL UNION, AMERICAN HUMANIST ASSOCIATION, UNITARIAN-UNIVERSALIST ASSOCIATION, COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY (NEW YORK), OHIO FREE SCHOOLS ASSOCIATION, AND PRESERVE OUR PUBLIC SCHOOLS (WISCONSIN) AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The *amici curiae* are non-profit, non-partisan organizations having a nation-wide membership of persons of all religious views and sects, including citizens of Missouri. They are devoted to the preservation and protection of the fundamental principles guaranteed to citizens of this country by the federal and state constitutions. They believe in the historic, basic American doctrine of separation of church and state and that only by its steadfast and strict observance can the religious freedom of all of the people be assured.

The *amici* are concerned over the numerous "severe contests" (to use Jefferson's words to describe the battles engaged in by him and by Madison to achieve constitutional religious freedom and separation of church and state) which are being waged today in the national and state legislatures, courts and executive branches to determine

whether the principles embodied in the Establishment Clause are to prevail against the ever expanding and more demanding claims of aggressive and dominant religious bodies and their leaders for public support of their sectarian schools.

The *amici* are concerned about the vast sums of public moneys, amounting to millions of dollars, that are being channeled, directly or indirectly, into sectarian schools by various sophisticated devices designed to circumvent the Constitutional prohibition. They are concerned about the efforts continually being made to extend the "verge" of constitutionality referred to in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and in *Sloan* v. *Lemon*, 413 U.S. 825 (1973). They are concerned over the number and variety of ingenious plans being devised for channeling state aid to sectarian schools in circumvention of the constitutional prohibition.

The *amici* believe that Title I of the Federal Elementary and Secondary Education Act of 1965, as construed by the Court of Appeals below, presents another such "ingenious plan" which violates the constitutional mandate against the sponsorship or financial support of religion or religious institutions and does not meet the cumulative criteria and tests recently enunciated by this Court for a statute to be constitutional under the Establishment Clause.

We believe this brief will be of assistance to the Court in resolving the important constitutional issues present in this case.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* is set out in the preceding motion for leave to file.

The Question Presented

This brief is directed only to the constitutional issue raised by the decision in the Court of Appeals. That issue, as stated in the petition for certiorari, is as follows:

> "If the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241e(a)(2), requires that, notwithstand-

> ing contrary State law, particular educational services funded pursuant to the Act be performed in religious schools by publicly employed personnel during regular school hours if they are performed in public schools during those hours, is it to that extent violative of the Establishment Clause of the First Amendment to the United States Constitution?"

This question is substantially embodied also in one of the issues stated in the pre-trial order (App. pp. 37-8), as follows:

> "Is it lawful to make personnel, who are employed to implement Title I projects, available on private school premises during regular school hours in order to provide special services to educationally deprived children attending private schools?"

While this brief is addressed only to the constitutional issue, *amici* support the position of the defendants, the District Court and the dissenting Circuit Judge that Title I does not mandate the furnishing of publicly employed teachers to teach in sectarian schools during regular school hours and that defendants are not required to violate the Constitution of Missouri in their use of Title I funds, as would occur if plaintiffs succeeded in obtaining the relief sought in the complaint and if defendants were required to carry out the mandate of the Court of Appeals.

Statement of the Case

Plaintiffs, respondents here, are parents of children attending nonpublic, parochial schools in Missouri. Suing individually and on behalf of the minor plaintiffs, they brought this class action in the United States District Court, Western District of Missouri, "on behalf of all educationally deprived children attending nonpublic schools" in the State of Missouri and prayed in their complaint for Defendants, petitioners here, are the Commissioner of Education of the State of Missouri and members of the Missouri State Board of Education (App. pp. 13-14).

This action concerns the interpretation, application and constitutionality of Title I of the Elementary and Secondary Educational Act of 1965, as amended (20 U.S.C. §§241a-241m, 242-244) which comprises a plan by which federal funds are granted to local public educational agencies for the purpose of providing programs for the special needs of educationally deprived children within local school districts.

Section 241e thereof (20 U.S.C. §241e) provides in pertinent part, as follows:

> (a) A local educational agency may receive a grant under this sub-chapter for any fiscal year only upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commission may establish)—
>
> (1) that payments under this subchapter will be used for programs and projects (including the acquisition

of equipment, payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools eligible for assistance under this section, and, where necessary, the construction of school facilities and plans made or to be made for such programs, projects, and facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs • • • and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this subchapter.

(2) That, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; . . .

The declared policy of Title I is to provide grants of federal funds to local educational agencies to assist them in expanding and improving their educational programs by various means which contribute particularly to meeting the

special educational means of educationally deprived children (20 U.S.C. §241a).

Plaintiffs allege that children attending nonpublic sectarian schools in Missouri are being arbitrarily denied, by the defendants, Title I funds and benefits to which they are entitled. More particularly, they assert that defendants have refused to provide publicly employed teachers to perform their educational and teaching functions under Title I programs on the premises of sectarian schools during school hours. In Missouri, Title I funds are paid to the State Board of Education which, in turn, allots funds to local School Boards.

Most of the Title I programs and funds in Missouri involve remedial reading, mathematics and languages, which are all secular subjects. Most of the funds allocated thereunder for public schools are used to pay the salaries of teachers and teachers' aides to give instruction in those secular subjects.

Defendants have refused to approve any applications for the allocation of Title I funds for the purpose of paying publicly employed teachers to give instruction in such subjects in sectarian schools during regular school hours. Defendants assert that for them to do so would violate the constitutional provisions and decisional law of Missouri; also, that Title I does not mandate their providing and assigning publicly employed teachers to sectarian schools during regular school hours and that if it did, it also would be unconstitutional under the First Amendment.

Defendants have approved Title I programs and the use of Title I funds to provide mobile educational services and

equipment, visual aids and educational radio and television in sectarian schools and teachers for after-school, weekend and summer school classes on public school premises, which are available to parochial school pupils.

Plaintiffs assert that such programs are not "comparable" to those provided in public schools, particularly in that they do not provide for the assignment for publicly employed teachers to parochial schools during regular school hours to carry out the instruction incidental to such programs.

Initially, the District Court dismissed Plaintiffs' action on procedural grounds and the Court of Appeals reversed and remanded the case to that Court for trial. *Barrera* v. *Wheeler,* 441 F.2d 795 (8 Cir., 1971). Plaintiffs then applied for a preliminary injunction and in a pretrial order the District Court stated the issues to be tried and decided (App. p. 37); see, also, *Barrera* v. *Wheeler,* 475 F.2d 1338 at 1341 (8th Cir., 1973).

After trial, the District Court, in an unreported opinion filed June 2, 1972 (Pet. for Cert. p. A 43; App. pp. 7, 39-40), denied plaintiffs' prayer for injunctive relief holding (1) that Title I does not mandate the assignment of teachers paid by Title I funds to nonpublic schools; (2) that students in nonpublic schools can receive their equitable mathematical share of the funds available in after-school or summer school programs and through visual aids and mobile equipment; and (3) that there is no evidence that the local school boards have refused to consult with nonpublic school authorities in preparing their applications for Title I funds or that any applications for Title I funds on an equitable basis for nonpublic school students have been denied at the local or state level, except those requesting

publicly salaried teachers in nonpublic schools. The District Court Judge also expressed the view that an interpretation of Title I, which would require the assignment of publicly employed teachers in parochial schools, "would raise serious questions as to the constitutionality of Title I" under the "teaching of the Supreme Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)."

The United States Court of Appeals for the Eighth Circuit, in a 2-1 decision [475 F.2d 1338 (1973)] reversed the District Court on the facts and the law and held, *inter alia*, that Title I mandated the assignment of publicly employed and paid teachers to nonpublic schools during regular school hours. It remanded the case to the District Court with instructions to enter an injunctive decree, containing guidelines. (Pet. for Cert. pp. A29-A30).

Dissenting Circuit Judge Stephenson (475 F.2d at 1358) stated that Title I "clearly *only permits* and does not mandate the assignment of public school teachers to private schools during school hours as clearly evidenced from the Acts' Legislative history." He also stated that if Title I does mandate the assignment of public school teachers to private schools, then he shared the District Judge's "grave concern that Title I, under such circumstances, could not withstand the constitutional challenge" and that the "entanglements" fostered by Title I, as so construed, "appear quite indistinguishable from the excessive entanglements proscribed by *Lemon*."

The injunction and judgment filed by the District Court on the remand enjoin and require defendants to furnish publicly employed teachers to teach private school children during regular school hours on the premises of the private

school attended by those children, if publicly employed teachers are furnished to public school children during regular school hours on the premises of the public school attended by those children. (Pet. for Cert. p. A-45)

Thus, the Constitutional issue has been raised by the decision of the Court of Appeals and its interpretation of the statute.

Summary of Argument

Title I [20 U.S.C. §241e (a)(2)] violates the Establishment Clause of the First Amendment of the Federal Constitution if, as construed by the Court of Appeals, it mandates the assignment of public employed teachers to nonpublic schools during regular school hours to render teaching services in remedial subjects.

Such a practice would constitute financial aid and support to religious institutions and religion and would involve the government in religious activity.

Nonpublic sectarian schools are religious institutions having an overall, basic purpose of religious indoctrination and religion permeates this entire curriculum and plant.

Constitutionally, there is no essential difference between a public subsidy that supplies teachers and teaching materials to a sectarian school and one that supplies cash to such a school for teachers and teaching materials, or accomplishes the same result indirectly by other devices.

Nor is there any constitutional difference between furnishing a publicly employed teacher to teach secular subjects in a sectarian school and paying the salaries of sectarian school teachers to teach secular subjects there, or

between the teaching of "general" secular subjects such as mathematics, languages and reading and the teaching of "specialized" secular subjects such as remedial reading, languages and mathematics.

Title I, as so construed, would violate the Establishment Clause because, at the very least, it would foster an excessive government entanglement with religion, administratively and politically; and also, because, it would not have a primary effect that neither advances nor inhibits religion. Moreover, if the real and underlying purpose of this statute is, as may be, to provide public financial assistance to sectarian schools by relieving such schools of certain educational expenses, then it would not have a secular legislative purpose.

Under the prior decisions of the Court and other courts, Title I, as construed and applied by the Court of Appeals, would clearly be in violation of the Establishment Clause of the First Amendment of the Federal Constitution, as well as in violation of the Missouri Constitution as construed by its highest Court.

ARGUMENT

If, as the majority of the Court of Appeals has held, the assignment of publicly employed teachers to nonpublic schools during regular school hours is mandated by Title I, then that act would be unconstitutional under the Establishment Clause of the First Amendment of the United States Constitution.

The Court of Appeals' majority has held that the assignment of publicly employed teachers to nonpublic schools during regular school hours is required by Title I. The majority took note of, but bypassed, the constitutional question on the ground that it would be "improper" for it "to pass on the constitutionality of an abstract program of remedial teaching services" not properly before it (*Barrera* v. *Wheeler*, 475 F.2d at 1353-4). Nevertheless, it took occasion to express, by way of dictum, the idea that the prior court decisions, holding that public funded teaching services on private school premises is unconstitutional, are "not directly controlling" because of their suggested distinction between "general" secular educational subjects and "specialized" secular educational subjects and services.

The dissenting Circuit Judge expressed "complete agreement" with the District Judge's conclusion that "Title I clearly does not mandate the assignment of teachers paid by Title I funds to nonpublic schools" and "shared" the District Judge's "grave concern" that Title I, as so interpreted, "could not withstand the constitutional challenge."

It is submitted that, as thus interpreted by the Court of Appeals, Title I clearly violates the First Amendment of the Federal Constitution, which provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

The purpose of the Establishment Clause was not simply to prevent the establishment of a state church or state religion, but to uproot all kinds of religion-state relationships. It was intended to create a complete and permanent separation of the spheres of religious activity and civil activity by comprehensively forbidding every form of public aid or support, direct or indirect, for religion. *Everson* v. *Board of Education*, 330 U.S. 1, 31-2 (1947) (Rutledge, J., dissenting); *McCollum* v. *Board of Education*, 333 U.S. 203, 213, 232 (1948) (concurring opinions); *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961); *Torcaso* v. *Watkins*, 367 U.S. 488, 493-4 (1961); *Abington School District* v. *Schempp*, 374 U.S. 203, 216-221, 229-30 (1963).

"No law respecting an establishment of religion" was intended to cover any step that could lead to such an establishment or any practice historically associated with, or incidental to an establishment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).

In earlier, basic cases in this area, this Court formulated and often reiterated the simple forthright test that:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion."

Everson v. *Board of Education*, 330 U.S. 1, 15-16 (1947); *McCollum* v. *Board of Education*, 333 U.S. 203, 210 (1948);

Zorach v. *Clausen*, 343 U.S. 306, 314 (1952); *Torcaso* v. *Watkins*, 367 U.S. 488, 493 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lemon* v. *Kurtzman*, 403 U.S. 602, 640-2 (1971) (Douglas, J., concurring). In its most recent decision (*Committee for Public Education and Religious Liberty* v. *Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5160), this Court again quoted that principle, thus recognizing its continued vitality. Many States, including Missouri, have constitutions or statutes prohibiting such support, directly or indirectly. See W. Gelhorn and R. Kent Greenawalt, "The Sectarian College and the Public Purse," Appendix B at 183-203 (1970); Missouri Constitution, Art. IX, Section 5; Art. I, Section 7; Art. IX, Section 8 V.A.M.S.

The highest court in Missouri has held that public funds may not be used to send public school teachers into parochial schools to teach speech therapy (*Special District for the Education and Training of Handicapped Children* v. *Wheeler*, 408 S.W. 2d 60 (1966).

Recently this Court has stated that the main evils which the Establishment Clause was designed to prevent were "sponsorship, financial support and involvement of the sovereign in religious activity." *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5157 (1973).

As Mr. Justice Douglas, concurring, said in the *Abington School District* v. *Schempp*, 374 U.S. 203, 229 (1963):

"The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools."

Mr. Justice Black, who wrote the Court's opinion in *Everson, supra,* certainly did not believe that anything said there justified the use of public funds to pay the salaries of teachers in sectarian schools, because in his dissenting opinion in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), he pointed out that tax-raised funds could not constitutionally be used to support "religious schools" or "to pay their teachers," not even "to the extent of one penny"; and he warned that the effort to have the salaries of religious school teachers paid with public funds would be forthcoming.

Sectarian or parochial schools of whatever denominations are religious institutions. They are an integral part of the religious mission, and probably the most vital part, of the parish or church that operates them. Their very purpose is to propagate a religious faith and to indoctrinate their students in that faith. The secular education which they provide is incidental to that general purpose. Such schools involve substantial religious activity and purpose and religion permeates the entire curriculum and school. The teachers generally are religiously trained teachers and members of that religion and the students are generally selected on the basis of their religious beliefs and church connections. If that were not so, there would be no point in having such a school. A few non-adherents may be admitted to these schools, but the school's goal would be frustrated if it did not adhere to its religious purposes. See,

generally, *Everson* v. *Board of Education*, 330 U.S. 1, 22-24 (1947) (Jackson, J., dissenting); *Board of Education* v. *Allen*, 392 U.S. 236, 262, *et seq.* (1968) (Douglas, J., dissenting); *Lemon* v. *Kurtzman*, 403 U.S. 602, 615-616 and 628, *et seq.* (Douglas, J., concurring); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5156 (1973); *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545, 553 (1972); *Wolman* v. *Essex*, 342 F. Supp. 399, 404-5, 419 (1972); *Public Funds for Public Schools of N. J.* v. *Marburger*, 358 F. Supp. 29, 33-4 (1973).

Manifestly, parochial schools are religious institutions. Any kind or amount of public support, direct or indirect, for such schools is an aid and support of religion. Obviously, teachers are absolutely essential to the operation of a sectarian school and its educational processes and teachers' salaries are probably the largest item of expense of such a school.

There is no difference, constitutionally, between the use of public funds to furnish publicly employed teachers to sectarian schools and the use of public funds to pay the salaries of teachers employed in the sectarian schools. Both constitute financial support of the sectarian school and of religion and are unconstitutional. Whether the public subsidy takes the form of supplying teachers and teaching materials to sectarian schools instead of furnishing cash to the school for such teachers and materials is constitutionally immaterial.

Moreover, there is no essential constitutional difference between (1) statutes such as those involved in the *Lemon* and *DiCenso* cases, under which public funds are used to pay the salaries of teachers employed in sectarian schools

for teaching secular subjects, such as mathematics, modern foreign languages and physical science; and (2) a statute, such as that involved here, under which public funds would be used to pay the salaries of publicly employed teachers sent into sectarian schools for the teaching of secular subjects such as remedial reading, mathematics and languages.

Nor is there any essential constitutional difference between the teaching of "general" secular subjects, such as mathematics, reading, languages and science and the teaching of "specialized" secular subjects such as remedial reading, languages and mathematics, as the Court of Appeals suggests.

What Mr. Justice Douglas said in his concurring opinion in the *Lemon* case, at page 641, is particularly appropriate here.

> Yet, in spite of this long and consistent history there are those who have the courage to announce that a State may nonetheless finance the *secular* part of a sectarian school's educational program. * * * A history class, a literature class, or a science class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes. The funds are used in these cases to pay or help pay the salaries of teachers in parochial schools; and the presence of teachers is critical to the essential purpose of the parochial school, *viz.*, to advance the religious endeavors of the particular church. It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time. Nor does it matter that he or she teaches no religion. The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or

science without any trace of proselytizing enables the school to use all of its own funds for religious training. • • • And sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones.

Under the "cumulative criteria" or "tests" developed by the Court in its more recent decisions, in order for a statute to pass muster under the Establishment Clause, it first "must reflect a clearly secular legislative purpose"; second, it "must have a primary effect that neither advances nor inhibits religion"; and third, it "must avoid excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13; *Committee for Public Education and Religious Liberty* v. *Nyquist*, 93 S. Ct. 2955; 41 L.W. 5153, 5157-8.

Title I, as interpreted by the Court of Appeals, does not meet one or more of these tests and thus violates the Establishment Clause. See *Lemon* v. *Kurtzman, supra; Earley* v. *DiCenso*, 403 U.S. 602 (1971); *Sanders* v. *Johnson*, 403 U.S. 955 (1971); *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545 (1972); *Public Funds for Public Schools of N. J.* v. *Marburger*, 358 F. Supp. 29 (1973); *State ex rel. Chambers* v. *School District No. 10*, 155 Mont. 422, 472 P.2d 1013 (1970); *Klinger* v. *Howlett*, —— Ill. —— (Oct. 1973); *Wolman* v. *Essex*, 342 F. Supp. 399 (1972), aff'd, 409 U.S. 808 (1972); *Special District for the Education and Training of Handicapped Children* v. *Wheeler*, 408 S.W.2d 60 (Sup. Ct. of Mo., en Banc (1966).

The *Lemon* case involved a Pennsylvania statutory program which provided financial support to nonpublic elementary and secondary schools by way of reimbursement

for the cost of teachers' salaries, textbooks and instructional materials in certain specified subjects—mathematics, modern or foreign languages, physical science and physical education. This was effected by the device of authorizing the State Superintendent of Public Instruction "to purchase" specified "secular educational services" from nonpublic schools. The program was limited to the aforesaid secular subjects and instructional materials and prohibited reimbursement for any course teaching religion, morals or a form of worship.

The *DiCenso* case involved a Rhode Island statute authorizing State educational officials to pay to teachers of secular subjects in nonpublic elementary schools part of their salaries, by way of "salary supplements." The teachers were required to teach only secular subjects, to use only secular teaching materials and not to teach a course in religion.

This Court held that both of these statutes violated the Establishment Clause because they involved "excessive entanglement between government and religion." In distinguishing the *Everson* and *Allen* cases, *supra*, which involved bus transportation and textbooks, the Court pointed out:

> "We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."

Where any teacher is functioning on sectarian school premises, and in immediate contact with sectarian school administrators and teachers, there is always a danger that

the secular and religious aspects of the instruction will not be separated. As Mr. Justice Douglas points out in his concurring opinion in *Lemon*, at page 635, "Sectarian instruction can take place in a course on Shakespeare or in one in mathematics." Moreover, it can take place just as well in the instruction of remedial secular subjects, as in the instruction of general secular subjects.

In *Sanders, et al.* v. *Johnson, et al.*, 403 U.S. 955 (1971), this Court affirmed, *per curiam*, a decision of a three Judge District Court [319 F. Supp. 421 (1970)] which held to be violative of the Establishment Clause a state statute authorizing the State Board of Education to contract with privately owned nonpublic elementary and secondary schools, including parochial schools, for the public purchase of "secular, educational services" to be supplied to school children. Such services were defined as "providing instruction in a secular subject." The District Court held the statute to violate the Establishment Clause in that the primary effect of the statute was one which advances religion and was not primarily secular in effect and involved an improper degree of government entanglement with religion.

In *Americans United for Separation of Church and State* v. *Oakey, supra*, the Court held unconstitutional under the Establishment Clause, a Vermont Act which provided that a school district could provide State-approved, public school teachers to parochial schools to teach certain secular subjects, more particularly, physical sciences, modern languages, mathematics and physical education. Teachers were to remain under the supervision of public school authorities.

The Court, citing *Lemon*, *DiCenso* and *Walz, supra*, held such a statute "surely involves excessive entanglement be-

tween government and religion," and a potential for church involvement in the political process" and "for the impermissible fostering of religion." What the Court said there concerning the Vermont statute is equally applicable to Title I, as interpreted to mandate the furnishing of publicly employed teachers to parochial schools, to wit:

"The Vermont Act will thrust the state not only directly into the physical plants of the schools but also into their operation and control. As such it surely involves excessive entanglement between government and religion.

"It is contended that because all the hiring of instructors and all the buying of teaching materials for the statutorily specified secular subjects is arranged for by the local school districts, there will be but little entanglement between church and state. The actual mechanics of this intrusion by the employees of the school districts into the sectarian schools is not spelled out in the statute. Presumably, the implementation of the plan is left to the school districts themselves. The potential, however, for involvement of the state, through the school districts, in religious affairs is not dispelled by its lack of articulation.

• • • • •

"We have, thus far, concentrated on the potential entanglement resulting from state-sponsored involvement in religious affairs. The statute also creates a similar potential for church involvement in the political process.

• • • • •

"While our approach on the entanglement issues could dispose of this case, we also point out that in the

operation of this statute a potential exists for the impermissible fostering of religion. We are not convinced that the statute as written guarantees that the parochial school utilization of school district teachers would not have the primary effect of the advancement of religion. As was noted in *Lemon*, the use of teachers—even for so-called secular subjects—on any program that utilizes sectarian facilities involves variables which are not, prior to program operation, readily ascertainable. The existence of those variables is not likely to be dispelled by the fact that the secular teachers are not hired by, and are theoretically responsible to, the public school superintendent. * * * Once within the church school, however, the instruction would become subject to pressures which the Court has warned use would make religious neutrality extremely difficult. The sectarian mission of the church-based parochial school cannot be overemphasized. It is unlikely that such schools carried on under religious auspices would exist if it were not for that mission. * * * Even without overt attempts to influence the teaching program of the secular instructor, the teacher would still be subject to the subtle but effective pressure of parochial administrative and religiously oriented parental approval. Moreover, the atmosphere of religion quite properly pervades the plant of a parochial school. Whether he be hired by the district or by the parochial school, no one can predict how any teacher will act or react when placed in that atmosphere."

In *Public Funds for Public Schools of New Jersey* v. *Marburger, supra*, the District Court held to be unconstitutional under the Establishment Clause, a State statute,

very much like Title I, which authorized the public education authorities to make available to nonpublic schools "auxiliary services," including remedial instructions in reading, mathematics, speech and physical education, to be performed in the nonpublic schools by publicly employed teachers. In holding that such programs involved an excessive church-state administrative and political entanglement, the Court said, at page 40:

> "The defendants argue that no surveillance would be required to enforce State limitations in the auxiliary program because the processes which would be involved in remedial reading or remedial arithmetic are clearly more peripheral to the possibility of religious indoctrination than the initial teaching of reading and arithmetic. Even though this argument is sound, to a degree, a teacher who teaches reading or remedial reading remains a teacher. A teacher's instruction may vary in content or emphasis and is not entirely predictable. A teacher is not a textbook, the contents of which remain constant, as the Court recognized in *Lemon*.
>
> • • • • •
>
> "This being so, it would be necessary to continually review the content of a teacher's instruction in order to see that it adheres to the restrictions imposed by the statute, in that it be confined only to secular and nonideological subject matter.
>
> "Moreover, it is clear that the teachers providing such auxiliary services will be functioning within the confines and environment of a given religious institution where a religious atmosphere may be pervasive. Although the teachers of auxiliary services are not

employed by a religious organization and are not directly subject to the direction and discipline of a religious authority, they will, nonetheless, be working in atmospheres dedicated to the rearing of children in a particular religious faith. Again it would seem that a constant review of that instruction would be required in order to determine that the religious atmosphere has not caused religion to be reflected—even unintentionally—in the instruction provided by such teachers. Furthermore, the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative restraints. See Lemon v. Kurtzman, supra, 403 U.S. at 619, 91 S. Ct. 2105."

Those comments are directly applicable here.

In *State ex rel. Chambers* v. *School District No. 10, supra,* the Supreme Court of Montana held violative of the State and Federal Constitutions, a school board resolution calling for a special tax levy to pay teachers, as full time employees of the public school district, to teach a standard course of secular instruction to students of parochial high school on the premises thereof. The Court, citing decisions of this Court, pointed out that parochial schools are religious institutions wherein religious and secular instruction is intermixed and that "if teachers were to be furnished at public expense to a parochial school, it would not be possible to determine where the secular purpose ended and the sectarian began."

Klinger v. *Howlett, supra,* involved several Illinois parochaid statutes enacted June 26, 1972, including one pro-

viding auxiliary service grants to parents of nonpublic school children. Auxiliary services included a provision for "remedial and therapeutic programs for educationally disadvantaged children." The Illinois Supreme Court held that provision, as well as others, unconstitutional under the Establishment Clause.

Wolman v. *Essex, supra,* involved an Ohio statute under which public funds could be used both for educational grants to parents of nonpublic school children and to provide to pupils attending nonpublic schools, services and materials including remedial reading and speech programs. The district court, after reviewing the prior decisions of this Court, held the statute to be unconstitutional under the Establishment Clause in that the statute did not have a valid secular purpose, and that it was doubtful that the statute neither advanced nor inhibited religion and that the statute fostered an excessive government entanglement with religion, administratively and politically.

See also *Special District for the Education and Training of Handicapped Children* v. *Wheeler,* 408 S.W.2d 60 (Sup. Ct. of Missouri, En Banc 1966).

Clearly, Title I, as so construed, involves, at the very least, excessive government entanglement with religion, administratively and politically, for the reasons discussed in the above cases, particularly, *Lemon, DiCenso, Nyquist, Oakey* and *Marburger.* Also, as so construed, this statute has a purpose and primary effect that advances religion, for the reasons discussed in one or more of those cases. There is no assurance that the state supported activity now authorized and mandated under this statute will not be used for religious indoctrination.

Despite any legislative declaration to the contrary, the underlying purpose of this statute is to financially assist sectarian schools by supplying them with publicly paid teachers to teach remedial secular subjects and thus to relieve the sectarian schools of the financial burden of obtaining their own teachers for the purpose of performing such teaching services. This, in turn, would release funds of the sectarian schools for their other educational purposes designed to carry out the religious purpose of the schools.

In recent years and since *Everson*, most of the legislative acts which have provided public assistance to sectarian schools have contained legislative declarations that the statute is for a public secular purpose. Despite the ingenious devices which are used to disguise the real purpose of such statutes, the underlying and undeclared purpose is to provide public aid and support to sectarian schools. The courts are not bound by such legislative declarations of policy (see *Nyquist, supra*). So, here, the court can find that the real, underlying purpose of this statute, as construed, is to provide financial support to sectarian schools by the means of supplying them with publicly paid teachers.

CONCLUSION

The constitutional issue presented here is whether Title I funds must be, or even may be, used to furnish publicly employed teachers to sectarian schools to give instruction therein in secular subjects, such as remedial reading, mathematics and languages. If the Missouri educational authorities do that, they will violate the State Constitution and decisional law of that State. They will also violate the First Amendment of the Federal Constitution.

This case simply involves one more ingenious plan for channeling state aid to sectarian schools. It requires no prophet to foresee that on the argument used to support Title I, as so interpreted, other arguments could be made for the use of public funds to supply publicly employed school teachers on the premises of sectarian schools to teach every secular subject in the curriculum.

Despite Madison's warning ("Memorial and Remonstrance", Appendix to dissenting opinion of Rutledge, J. in *Everson* v. *Board of Education* 330 U.S. 1, 63, 65) the simple, forthright Constitutional principles embodied in the Religious Clauses of the First Amendment are becoming entangled in corrosive precedents, and citizens are being compelled through taxation to support religious schools, not simply to the extent of "three pence", but to the extent of many millions of dollars. This is being accomplished by a seemingly infinite variety of ingenious and sophisticated devices designed to circumvent the constitutional prohibitions and to make it appear that this support is not for the benefit of religious schools, but only for the benefit of pupils or their parents or the public welfare. Cf. "Edu-

cation in a Democracy: Financial Support of Private, Public and Parochial Schools," pp. 17-28, Human Rights, Volume Three, Number One (Summer, 1973) (Journal of the Section of Individual Rights and Responsibilities of American Bar Association).

It is respectfully submitted that the judgment of the Court of Appeals herein should be reversed and that the case should be remanded to the District Court for a dismissal of the complaint.

Respectfully submitted,

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